VALENTINE ELECTRONICS (M) SDN. BHD.

v.

LONG KIM

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[ORIGINATING MOTION NO. 25-49-91]
28 FEBRUARY 1992

LAND LAW: *Option - Whether supported by valuable consideration - Purported option was given to purchase two plots of land - Whether caveator's acceptance of the offer to purchase only one of the plots with reduced price - Is a valid exercise of the option - Whether act is a counter offer.*

This was an application by a registered proprietor (the caveatee) under s. 327(1) of the National Land Code 1965, for removal of a caveat lodged by an alleged purchaser (the caveator) against certain land comprised in HS(D) 4635.

On 27 July 1991, the solicitors for the option by a letter dated the same day addressed to the caveator's agent - *inter alia* exercising the said option to purchase only one of the two plots of land. This was rejected by the caveator's agent Jurutera Perunding by a letter dated the same day. On 1 August 1991, the caveator lodged his caveat relying upon the purported exercise of the said option.

The question at issue that was submitted before the Court was whether the option was void for lack of consideration and whether if the said option were valid, it had not been exercised within the stipulated period upon a proper construction of the letter dated 27 July 1991.

Held:

[1] Clearly for an option to be enforceable it must be supported by valuable consideration. But, even if an option is unenforceable as an option because of lack of consideration it could still be good as an offer since the feature which distinguishes an option from a mere offer is the consideration. Therefore such an offer if accepted before the revocation, can give rise to a contract. This submission therefore fails.

[2] In the present case the purported option was given to purchase two plots of land at the prices specified therein, so the option could only have been validly exercised in the prescribed manner upon the prescribed terms. But in exercising the option the caveator accepted the offer to purchase while offering a reduced price in respect of the other plot.

[3] In these circumstances, the learned Judge did not consider that the option had been exercised upon the prescribed terms and so it was not a valid exercise of the option. It amounted to a counter offer which in the event, the caveator had rejected. On this ground alone it was held that the caveatee is entitled to succeed.

[4] It is settled law that generally if there appears to be any conflict of evidence which is not on the face of it implausible, such a conflict ought not to be disposed of on affidavit evidence only. However, in this case, the learned Judge did not consider that there were serious questions to be tried in a witness action, because the resolution of the issues arising depended upon the proper interpretation of the contemporary correspondence, all of which were before the Court.

[Order for the removal of the caveat.]

Cases referred to:
Macon Works & Trading Sdn. Bhd. v. Phang Hon Chin [1976] 2 MLJ 177 ***(cit)***
Goldsbrough, Mort & Co. Ltd. v. John Thomas Quinn [1910] 10 CLR 674 ***(cit)***
Eng Mee Yong & Ors v. Letchumanan [1979] 2 MLJ 212 ***(foll)***

Legislation referred to:
National Land Code 1965, s. 327(1)

For the applicant - Gerard Chan Weng Yew; M/s. Lim Kean Siew & Co.
For the respondent - Yeap Ghim Guan; M/s. Yeap & Co.

JUDGMENT

Edgar Joseph Jr J:

This was an application by a registered proprietor (the caveatee) under s. 327(1) of the National Land Code, 1965, for removal of a caveat lodged by an alleged purchaser (the caveator) against certain land comprised in H.S. (D) 4635.

The facts underlying this application may be briefly stated.

On 12 July 1991, M/s G.B. Neoh, the solicitors for the caveator, had written a letter dated the same date to the caveatee's agent M/s MWA Jurutera Perunding, requesting for an option to purchase two plots of land known as H.S.(D) 4635 and 4636, situated in Seberang Perai Tengah in the following terms:

> Our Ref: C/Con/Gan/1991/889
> Date: 12 July 1991
>
> M/s Leong Tan Agency,
> 46, Argyll Road,
> 10050 Penang.
>
> Dear Sirs,
>
> H.S.(D) 4635 & 4636, S.P.T. Penang
>
> We refer to the above regard and wish to inform you that we are acting for and on behalf of Madam Long Kim, who is the representative of a company in Kuala Lumpur.
>
> The second company is interested to acquire the above lands from your clients.
>
> In order to facilitate matters, our clients request that your clients give an option to our client for a period of 10 days so that the deal can be concluded soonest possible.
>
> Thank you,
>
> Yours faithfully,
>
> sgd.
>
> P/S: The purchase price offered by our clients is:
>
> 1. H.S. (D) 4635 - RM8.90 p.s.f.
> 2. H.S. (D) 4636 - RM8.50 p.s.f.
>
> Also at : Bangunan UMBC, 2nd Floor,
> No. 88, Jalan Ibrahim,
> 08000 Sungai Petani, Kedah.
> Tel: 411008 & 411880

On 17 July 1991, the cavetee's agent Jurutera Perunding had given the purported option dated the same day addressed to M/s. G.B.Neoh by fax in the following terms:

MWA Jurutera Perunding
Consulting Engineers
4, Lorong Aman, Pulau Tikus,10350
Tel: 374579 / 374673
Fax: No. 604-363778

Facsimile Transmission Sheet

To: Syarikat GB Neoh — Fax No; 62L724
From: Michael Wong — Our Ref; 144/91
Date: 17 July 1991 — Total Number of Pages: 1/1 (Including This One)

Subject; Sale of H.S. (D) 4635 & 4636, S.P.T. Penang

(If YOU DO NOT RECEIVE ALL PAGES PLEASE TELEPHONE OR FAX US)

Your letter ref C/Con/Gen/1991/889 dated 12 July 1991 refers. On behalf of M/s Valentine Electronics (M) Sdn. Bhd. I accept your offer as follows:

H.S. (D) 4635 @ RM8.90 psf
H.S. (D) 4636 @ RM8.50 psf

I hereby furnish you the option for a period of 10 days from this date expiring on 27 July 1991 for your client to consider the purchase.

Futhermore MWA Jurutera Perunding should be given the first right of refusal for the consultancy services.

Thank you,

Yours faithfully,

sgd. IR, Michael Wong

c.c. M/s Leong Tan Agency

On 27 July 1991, the solicitors for the caveator purported to exercise the option by a letter dated the same day addressed to the caveatee's agent Jurutera Perunding in the following terms:

Syarikat G.B.Neoh
Peguambela dan Peguamcara
Advocates & Solicitors

Your Ref: 144/91
Our Ref: C/320/91/THJ/jl

Date: 27 July 1991

MWA Jurutera Perunding
No. 4, Lorong Aman, Pulau Tikus
10350 Penang

Dear Sir,

Re: Sale of H.S. (D) 4635 & 4636 S.P.T. Penang

We refer to your fax transmission dated 17 July 1991.

This is to inform you that your client Madam Long Kim informed us that she has managed to secure a purchaser to a purchase H.S. (D) 4635 at the price of RM8.90 psf.

For H.S. (D) 4636, the purchaser request that the selling price be at RM8 psf.

As to your consultancy services, the purchaser request that you provide them with a detail of your service charges in a separate letter for the purchaser's consideration.

Yours faithfully,
sgd.
Encls.

Also at: Bangunan UMBC, 2nd Floor,
No. 68, Jalan Ibrahim,
08000 Sungei Petani, Kedah.

On 30 July 1991, the caveatee's agent Jurutera Perunding by a letter dated the same day, rejected the purported exercise of the option to purchase only one of the two plots of land in the following terms:

B.T.Lee Danny C.N. & Co.
Advocates & Solicitors,
Peguambela dan Peguamcara

No. I-C, King Street,
10200 Penang.
Tel: 04-830778 & 635560
Fax: 637289

Your Ref: C/320/91/THJ/jl
Oue Ref: CON/ MWA/262/91/t

30 July 1991

M/s G.B.Neoh
Advocates & Solicitors
2nd Floor
No. 10 Bishop Street
10200 Penang.

Dear Sirs,

Re: Properties comprised in H.S. (D) 4635 and 4636 S.P.T. Penang

Letter dated 27 July 1991 addressed to MWA Jurutera Perunding

We act for M/s. MWA Jurutera perunding of No. 4 Lorong Aman Pulau Tikus 10350 Penang.

We have been handed your letter dated 27 July 1991 by our clients with instructions to reply thereto.

We are instructed by our clients to reject your client's offer as our clients' intention is to dispose off the abovementioned properties jointly.

Yours faithfully,
sgd.
cc. clients

On 1 August 1991, the caveator lodged her caveat relying upon the purported exercise of the option.

The first submission made by Counsel for the caveatee was that the option was void for lack of consideration.

Clearly for an option to be enforceable it must be supported by valuable consideration. (See *Macon Works & Trading Sdn. Bhd. v. Phang Hon Chin* [1976] 2 MLJ 177). But, even if an option is unenforceable as an option because of lack of consideration it could still be good

as an offer since the feature which distinguishes an option from a mere offer is the consideration. (See *Goldsbrough, Mort & Co. Ltd. v. John Thomas Quinn* [1910] 10 CLR 674, 691). Therefore, such an offer if accepted before its revocation, can give rise to a contract, This submission therefore fails.

The second submission made by Counsel for the caveatee was that even if the option were valid it had not been exercised within the stipulated period for upon a proper construction of the letter dated 27 July 1991, from the caveator's solicitors, the contents thereof showed that the caveator had not exercised the option, but was merely making a counter offer to purchase Lot 4635 at RM8.90 per square foot and Lot 4636 at RM8 per square foot. It will be recalled that the purported option contained in the caveatees agent's letter dated 17 July 1991 quoted a price of RM8.90 per square foot in respect of H.S. (D) 4635 and a price of RM8.50 per square foot in respect H.S. (D) 4636.

With this submission I agree. When, as here, a grantee in purporting to exercise the option adds any new term or varies an existing term, the exercise of the option will not bring into being a binding contract. In the present case the purported option was given to purchase two plots of land at the price specified therein, so the option could only have been validly exercised in the prescribed manner upon the prescribed terms. But in exercising the option the caveator accepted the offer to purchase only one of the plots at the price quoted while offering a reduced price in respect of the other plot. The caveatee then promptly by letter dated 30 July 1991 through their solicitors rejected the caveator's offer saying that it was their client's intention to dispose of both the plots jointly at the quoted price. In these circumstances, I did not consider that the option had been exercised upon the prescribed terms and was not a valid exercise of the option. It amounted to a counter offer which, in the event, the caveatee had rejected. On this ground alone, the caveatee is entitled to succeed.

There are at least two further grounds why the option was not validly exercised.

In the first place, the caveator's solicitors had in their letter dated 27 July 1991 purporting to exercise the option merely said that their client had managed to secure a purchaser to purchase H.S. (D) 4635 at the price of RM8.90 per square foot. This, in my view, was not an effective exercise of the option for it merely meant that the caveator was in a position to introduce a potential purchaser of the particular plot at the price quoted. If, and when, such a purchaser were introduced, other essential terms of the sale and purchase transaction would still remain to be negotiated; for example, as to the date of completion and the mode of payment of the purchase price. Futhermore, the charges for consultancy payable to the caveatee's agents according to the option had been expressly reserved for consideration by the caveator in the purported letter of acceptance.

It is settled law that generally if there appears to be any conflict of evidence which is not on the face of it implausible, such a conflict ought not to be disposed of on affidavit evidence only (per Lord Diplock in *Eng Mee Yong & Ors. v. Letchumanan* [1979] 2 MLJ 212, 216 col 1B). However, in this case, I did not consider that there were serious questions to be tried in a witness action, because the resolution of the issues arising depended upon the proper interpretation of the contemporary correspondence all of which were before me.

In the result, I ordered removal of the caveat and payment by the caveator of the costs of the proceedings.

Also found at [1992] 2 CLJ 1092